Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN D. FREEMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent(s).

On Petition for Writ of Certiorari
To The Supreme Court of the
State of Florida

PETITION FOR WRIT OF CERTIORARI

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"CAPITAL CASE"

QUESTIONS PRESENTED:

1. The Florida Supreme Court continues to hold that aggravating circumstances necessary for imposition of the death penalty can be found by a trial judge, and not a jury beyond a reasonable doubt. Does the Florida Supreme Court incorrectly interpret and apply the United States Supreme Court's holding in Ring v. Arizona, thus violating Sixth, Eighth, and Fourteenth Amendment Rights of the United States Constitution, when it continues to hold that aggravating circumstances necessary for imposition of the death penalty can be found by a trial judge, and not a jury beyond a reasonable doubt?

2. Is the judicial "weighing" of aggravating and mitigating circumstances under Fla. Stat. 921.141 (3) (2003), a "factual determination" that increases the maximum punishment of a defendant, and should this "weighing" of aggravating and mitigating circumstances be conducted and found by a jury beyond a reasonable doubt under Ring v. Arizona and Apprendi v. New Jersey?

PARTIES TO THE PROCEEDINGS BELOW:

Petitioner is John D. Freeman. He is the Defendant sentenced to death in the trial court, and the Appellant in his 3.850 Motion for Postconviction Relief to the Supreme Court of Florida. He brings this action not only on his own behalf, but on behalf of all capital postconviction defendants in the State of Florida.

Respondent is the State of Florida. The State of Florida compromised the Plaintiff in the trial court, as well as Defendant's subsequent appeal regarding the denial of his 3.850 Motion for Postconviction Relief.

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PETITION FOR WRIT OF CERTIORARI:

John Freeman respectfully petitions for a writ of certiorari to vacate and remand the judgment of the Florida Supreme Court for reconsideration, in light of the United States Supreme Court's decisions in *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*.

OPINIONS BELOW:

This case began following the trial court's second order of denial of Petitioner's first 3.850 Motion for Postconviction Relief, dated July 24, 2001, upon remand by the Florida Supreme Court in *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000). The opinion of the Supreme Court of Florida affirming said trial court's denial is reported at 858 So. 2d 319 (Fla. 2003), and was entered on July 11, 2003.

JURISDICTION:

The judgment to be reviewed was entered by the Florida Supreme Court on July 11, 2003, reported at *Freeman v. State*, 858 So. 2d 319 (Fla. 2003). The Motion for rehearing was denied by the Florida Supreme Court on November 25, 2003, reported at *Freeman v. State*, 2003 Fla. LEXIS 2078 (Fla. 2003). The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. Florida Statute 921.141 (3) (a) (b) (2003), states:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH:

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5),

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with Florida Statute s. 775.082.

2. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

4. The Eighth Amendment to the United States Constitution provides in relevant part: "cruel and unusual punishments shall not be inflicted."

STATEMENT OF THE CASE:

This Petition concerns the continuing viability of Florida's capital sentencing statute in light of the United States Supreme Court's holding of *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*. This petition centralizes on two issues: (1) Whether it is constitutionally sound under the Sixth, Eighth, and Fourteenth Amendments to impose a sentence of death utilizing aggravating circumstances not found by a jury beyond a reasonable doubt and; (2) Whether it is constitutionally sound under the Sixth, Eighth, and

Fourteenth Amendments for a trial judge, and not a jury beyond a reasonable doubt, to "weigh" the aggravating and mitigating factors to determine whether a sentence of death is deserved.

There is a marked division regarding the aforementioned issues. Various state and federal courts throughout the United States are in complete disarray concerning the true holding and scope of *Ring v. Arizona*. The contrasting interpretations and applications of the United States Supreme Court's holding in *Ring* undoubtedly create confusion among the general population of American citizens, ultimately undermining public confidence in the death penalty. There is also a distinct possibility that these interpretations result in constitutional rights being violated and jeopardized. In sum, the lower courts seek and require guidance. The United States Supreme Court must define the exact effect *Ring* has on capital sentencing statutes. If the United States Supreme Court does not rule on this issue, lower courts will continue to incorrectly and arbitrarily interpret and apply one of the most recent holdings issued on America's death penalty system.

I. FACTUAL BACKGROUND

Petitioner was convicted of first degree murder for the 1986 murder of Leonard Collier. The jury recommended death by a vote of 9-3. Petitioner was subsequently sentenced to death based on the judicial finding of three aggravating circumstances: (1) Petitioner was previously convicted of first degree murder, armed robbery, and burglary of a dwelling with an assault; (2) Petitioner committed the Collier murder for pecuniary gain and; (3) Petitioner committed the Collier murder during the commission of a burglary of a dwelling. There were no statutory mitigators found by the judge. Four nonstatutory mitigators were found: (1) Petitioner was of low

intelligence; (2) He had been abused by his stepfather; (3) He possessed some artistic ability; and (4) Petitioner enjoyed playing with children.

II. PROCEEDINGS BELOW

Petitioner's conviction and sentence were affirmed on appeal. *Freeman v. State*, 563 So. 2d (Fla. 1990). Petitioner then filed his first motion for postconviction relief, which the trial court summarily denied. *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000). Petitioner appealed the summary denial of his postconviction motion. The Supreme Court of Florida granted Petitioner's appeal and remanded the case back to the trial court. Id. The trial court then conducted an evidentiary hearing on the remanded claim and held there was no error. Petitioner appealed the trial court's second denial of his postconviction motion to the Florida Supreme Court, whereby the Florida Supreme Court affirmed the trial court's denial of relief. *Freeman v. State*, 858 So. 2d 319 (Fla. 2003). Petitioner filed a Motion for Rehearing based on the Florida Supreme Court's affirmation of the trial court's denial. The following pertinent issues were raised in the Motion for Rehearing: (1) Whether *Ring v. Arizona* allows a Florida trial judge to find and utilize aggravating circumstances necessary for imposition of the death penalty; (2) Whether a prior felony conviction aggravating circumstance constitutionally allows a judge to find the existence of other aggravating circumstances necessary for imposition of the death penalty; and (3) Whether the judicial "weighing process" of aggravating and mitigating circumstances is a factual determination subject to the holding in *Ring*, and thereby should be found by a jury beyond a reasonable doubt. The Florida Supreme Court denied Petitioner's Motion for Rehearing on November 25, 2003. No opinion or attention was given to Petitioner's alleged *Ring* claims. Petitioner

subsequently files this Writ of Certiorari to the United States Supreme Court, asking this court to remand the Florida Supreme Court's denial of Petitioner's case in light of the holding in *Ring v. Arizona*.

REASONS FOR GRANTING THE PETITION:

MAY IT PLEASE THE COURT:

Petitioner initially states the issues presented in this Writ of Certiorari implicate the integrity and the viability of America's death penalty system. Petitioner claims that both the lower state and federal courts throughout the United States cannot agree how to constitutionally proceed through a capital offense case. The lower courts cannot be allowed to continue the arbitrary application of death sentences throughout this country. Guidance is needed and required to ascertain definitive rules for the following issues Petitioner presents. Finally, a definitive decision is needed to resolve the apparent ambiguity and inconsistent applications of *Ring v. Arizona*.

1. **PETITIONER WAS SENTENCED TO DEATH IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. THE TRIAL JUDGE, AND NOT THE JURY, FOUND AND UTILIZED AGGRAVATING CIRCUMSTANCES OTHER THAN PETITIONER'S PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE TO IMPOSE PETITIONER'S DEATH SENTENCE.**

   A. Florida's maximum penalty for first degree murder under Fla. Stat. 921.141 is life imprisonment. Therefore, any aggravating

circumstance necessary for imposition of the death penalty operates as a functional equivalent of an element of a greater offense.

Florida's capital sentencing statute allows a judge to impose the death penalty based on aggravating factors not found by a jury beyond a reasonable doubt. This is a violation of Petitioner's Due Process rights, the rules of law declared in *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, *Apprendi v. New Jersey*, and the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Petitioner alleges that under *Ring*, a trial judge cannot find the existence of *all* aggravating circumstances necessary to impose a sentence of death.

Petitioner's contention first rests on the holding in *Ring v. Arizona*, whereby the United States Supreme Court extended from and restructured its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). [The *Apprendi* Court held "if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it - must be found by a jury."] Id. *Ring* held that: (1) *Apprendi's* holding applied to death penalty cases and thereby *Walton v. Arizona* was overruled; (2) Arizona's maximum penalty for first degree murder is life imprisonment, and therefore Arizona's aggravating circumstances operate as "the functional equivalent of an element of the offense." 536 U.S. 584 (2002).

To explain its holding in *Ring*, the Court first held the Arizona capital sentencing statute in question authorized only a maximum punishment of life imprisonment, because said Arizona statute explicitly cross-referenced the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty. *Ring* held that the required finding of an aggravating circumstance

exposed *Ring* to a greater punishment than that authorized by the jury's guilty verdict." Id. ["A defendant may not be exposed... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."] *Ring* further stated that if Arizona was to prevail on its argument that the maximum punishment was death, *Apprendi* "would be reduced to a meaningless and formalistic rule of statutory drafting." Id.

The *Ring* Court then held since life is the maximum punishment under Arizona law, (unless an aggravating circumstance was proven) Arizona's aggravating factors operate as the "functional equivalent of an element of a greater offense." Id. ["The dispositive question, we said, is one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."] *Ring* concluded by stating that, "a sentencing judge, sitting without a jury, cannot find an aggravating circumstance necessary for imposition of the death penalty," and "the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." 536 U.S. 584 (2002).

A short time later this Court's ruling in *Sattazahn* reaffirmed *Ring's* holding. ["Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond reasonable doubt."] 537 U.S. 101 (2002). The *Sattazahn* Court premised said reasoning on the fact that capital sentencing statutes which prescribe a finding of an

aggravating circumstance before a death sentence may be imposed make: "murder a distinct, lesser included offense of murder plus one or more aggravating circumstances, whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." Id.

Both Florida and Arizona capital sentencing statutes requires at least one aggravating factor be found to impose a sentence of death. Therefore, *Ring* and *Sattazahn's* holdings clearly implicate Florida law in the regard that: In form, Florida's maximum penalty for first degree murder is death, but in effect, the maximum penalty is life imprisonment unless the jury finds the existence of any aggravating circumstances. Petitioner alleges Florida's aggravating circumstances operate as "facts that increase the maximum punishment that may be imposed, and those facts, no matter how the state labels them, constitutes an element and must be found by a jury beyond a reasonable doubt." *Apprendi*, 530 U.S. 466 (2000).

Petitioner points to Florida's capital sentencing scheme. To determine whether a Defendant will be sentenced to death in Florida, the jury is only required to find "the existence of one aggravating factor." Fla. Stat. 921.141(1) (2001). By finding the existence of one aggravating factor, the jury does not have to make any written findings of what aggravating factor was found. Id. Moreover, said Florida Statute holds that once the existence of the aggravating factor is found by the jury, the Defendant is then rendered "death eligible". Id. Once a defendant is found death eligible, a judge shall then find other aggravating circumstances not found by a jury beyond a reasonable doubt. The judge will then weigh said aggravators against any judicially found mitigators. If

aggravation outweighs mitigation, a sentence of death will be imposed. Fla. Stat. 921.141 (3) (a) (b) (2001).

If a Florida judge does not make findings of all aggravating and mitigating circumstances necessary for the imposition of death, Florida law requires the Defendant be punished by life imprisonment. Fla. Stat. 775.082 (2001). Therefore, Florida law holds if the requisite written findings of sufficient aggravation outweighing mitigation are not found by a judge; a jury verdict of guilt by first degree murder (and sentence of life imprisonment) will be the maximum sentence imposed. Id.

Despite the recent holdings of *Ring* and *Sattazahn*, Florida's capital sentencing scheme has been upheld. The Florida Supreme Court holds that (1) Florida's maximum punishment is death, and (2) aggravating circumstances are "sentencing factors," *not* the functional equivalent of the offense. See *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) [*Mills* based on the fact "no Court has extended *Apprendi* to capital schemes," and "because *Apprendi* did not overrule *Walton v. Arizona*, the basic scheme in Florida is not overruled either."]; See also *Hildwin v. Florida*, 490 U.S. 638 (1989).

Although the Florida Supreme Court has refused to alter the capital sentencing statute by applying *Ring*, there is much disagreement amongst the Florida Supreme Court Justices if this decision is constitutionally sound. For example, Justice Pariente stated in a concurring opinion to *Bottoson v. Moore* that, "I believe the Supreme Court's decision in *Ring* requires this Court recede from its previous holding in *Mills v. Moore*, that death is the maximum penalty for first-degree murder in Florida." 833 So. 2d 693 (Fla. 2002). Justice Pariente further stated in *King v. State* that, "I believe we should acknowledge the U.S. Supreme Court's evolution in Sixth Amendment

jurisprudence from the time of *Spaziano* and *Hildwin* and recognize that those decisions, which came well before *Apprendi* and *Ring*, are of uncertain precedent as to the specific Sixth Amendment holding in *Ring* that aggravating factors in a death penalty statute must be found by a jury." 831 So. 2d 143 (Fla. 2002). Justice Quince held in *Bottoson* that, "the Court (Supreme Court of the United States) seems to have turned the concept of statutory maximum on its head." Id. Continuing with *Bottoson*, Chief Justice Anstead held, "After *Ring*, that harbor (Florida's death penalty scheme) may not be so safe, and *Ring* is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*." Id. In fact, the Florida Supreme Court is evenly divided concerning *Ring's* impact on Florida's capital sentencing scheme. See Id.

The Florida Court's decision to downplay the effect of *Ring* on the capital sentencing statute is far from universal throughout the lower courts of the United States. To the contrary, some courts have interpreted and applied *Ring* in manners adverse to Florida. Some of these courts have even addressed Florida's apparent lack of urgency regarding the *Ring* issue. See *Tennessee v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002; ["Initially, we reject the state's contention that *Apprendi* and *Ring* are not applicable to the present case because imposition of the death penalty does not enhance the defendant's sentence for his first degree murder conviction beyond its statutory maximum. The United States Supreme Court expressly rejected this argument in *Ring*, concluding that the required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury's verdict of conviction."] *Ring v. State*, 65 P. 3d 915 (Ariz. 2003); [Holding the U.S. Supreme Court "requires a jury to consider all aggravating factors urged by the State and not either (1) exempt from *Ring v. Arizona*, (2) implicit

in the jury's verdict, or (3) otherwise established beyond a reasonable doubt."] *Caulk v. Delaware*, 815 A. 2d 314 (Del. 2002), ["It is sufficient to note that each justice (In Florida) analyzed many of the intricate issues raised in *Ring* and reached different conclusions as to the future effect of the *Ring* decision."]; *Johnson v. Nevada*, 59 P. 3d 450 (Nev. 2002), ["A panel of judges, without a jury, cannot find aggravating circumstances necessary for imposition of the death penalty."]; *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111, ["*Ring* established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. *Ring* requires the vacation of a capital judgment based on judge-made findings."]

The aforementioned case law shows there is controversy concerning *Ring's* application throughout the United States. Further, this controversy is of great national importance. In particular, the different (and inconsistent) interpretations and applications of *Ring* force American citizens to believe the death penalty system is still being applied arbitrarily. Also, the various interpretations of *Ring* leave the American people in disarray as to the importance of U.S. Supreme Court decisions. Without uniform application of the law, people will question the merits of a Supreme Court decision. Individual state discretion cannot be allowed to persist for Ring's application. If this continues to happen, public confidence in America's death penalty system will surely be undermined.

Continuing, one issue that seems to be clear is that Florida's capital sentencing statute is similar to the pertinent statute in Arizona, the same statute the United States Supreme Court found to establish a maximum sentence of life in *Ring v. Arizona*. For example, the *Ring* Court reasoned that since Arizona's

statute explicitly cross-referenced a statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty, Arizona's first degree murder statue authorized a maximum penalty of death only in a formal sense. *Ring v. State*, 536 U.S. 584 (2002).

Florida's capital sentencing statute is no different than Arizona's in this regard, for Florida's statute also holds that at least one aggravating circumstance must be found before a judge can impose the penalty of death. Fla. Stat. 921.141 (2002). The Florida and Arizona capital sentencing statutes are "otherwise identical regarding the prerequisites to the imposition of the maximum penalty." *Bottoson*, 833 So. 2d 693 (Fla. 2002) (Pariente concurring in result only). Despite this similarity, the Florida Supreme Court refuses to apply the clear meaning of *Ring v. Arizona*. Nor will the Florida Supreme Court make an alternative interpretation of *Ring* in relation to the Florida capital sentencing scheme unless: "the U.S. Supreme Court and not this Court definitively removes the uncertainty of Florida's death penalty statute." See *King v. State*, 831 So. 2d 143 (Fla. 2002).

Petitioner contends by upholding Florida's capital sentencing statute in defiance of *Ring v. Arizona*, the Florida Court is "perpetrating legal error under the guise of stare decisis." See *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987). ["Stare decisis does not command blind allegiance to precedent. Perpetrating an error in legal thinking under the guise of stare decisis serves no-one well and only undermines the integrity and credibility of the Court."] By yielding to the precedent, the Florida Court ignores the fact that *Ring* affects its capital sentencing statute and prior holdings regarding the maximum sentence a person accused of first-degree murder can face. By requiring the finding of an

aggravating circumstance before death can be imposed (and holding that life imprisonment is not the maximum penalty); Florida is in direct conflict with *Ring* and *Sattazahn's* holding that, "murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances." 537 U.S. 101 (2002). Despite the apparent contradiction, Florida continues to uphold its precedent. "Although the doctrine of stare decisis is of fundamental importance to the rule of the doctrine of law... (the Court's) precedents are not sacrosanct." See *Ring*, 122 S. Ct. 2428 (2002). Therefore, not only is the Florida Supreme Court ignoring the holdings of *Ring* and *Apprendi*, but it is ignoring the "not of form, but of effect," of its own capital sentencing statute.

The Florida Court's nonfeasance to apply *Ring* creates a great constitutional violation. A Florida trial judge is allowing the jury to convict a defendant of one offense [first-degree murder] but the judge is then subsequently sentencing a defendant as if convicted for an entirely separate offense [capital murder] of which the jury did not convict defendant of. See *Cole v. Arkansas*, 333 U.S. 196 (1948) ["It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him on a charge that was never made...To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."]; *Sullivan v. Louisiana*, 508 U.S. 275 (1993) ["To hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the finding to support that verdict might be - would violate the jury trial guaranteed."] ["Due Process protects a defendant from criminal conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged."] *In re Winship*, 397 U.S. 358 (1970). Therefore, Petitioner

requests this Court to grant this Petition and hold that life imprisonment is the maximum penalty a Florida defendant faces for first degree murder.

B. In the existence of a prior violent felony aggravating circumstance, the United States Supreme Court's holding in *Almendarez-Torres* does not allow a Florida trial judge to find the existence of other aggravating circumstances necessary for imposition of the death penalty. Further, *Torres* does not allow the trial judge to find the underlying facts of a prior violent felony aggravating circumstance. The existence of aggravating circumstances other than a prior violent felony or a "murder committed during the course of a felony," and the underlying facts of any prior violent felony aggravator must be found by a jury beyond a reasonable doubt.

In *Almendarez-Torres*, the United States Supreme Court held a prior conviction of recidivism may be found by a judge, and not a jury, to increase a defendant's maximum sentence beyond the range otherwise permissible. 523 U.S. 224 (1997). The United States Supreme Court subsequently stated in *Torres* that, "recidivism is a traditional, if not the most traditional, basis for a sentencing court's increasing of an offender's sentence." Id. The United States Supreme Court concluded the provision did not define a separated offense, but rather was a penalty provision which authorized the trial court to increase the sentence for a recidivist. Id. Accordingly, the court held the government was not constitutionally required to allege the petitioner's prior convictions in the indictment. Id.

Subsequently, *Apprendi v. New Jersey* (decided subsequently to *Torres*) held *Torres* was a "narrow exception, one that turned heavily upon the fact that...procedural safeguards attach to any "fact" of prior conviction." 530 U.S. 488 (2000). After *Apprendi*, the United States Supreme Court held in *Ring v. Arizona* that the *Torres* decision was not being challenged. 536 U.S. 584 (2002).

The Florida Supreme Court has interpreted *Torres* and *Ring* to mean that a trial judge can find the existence of aggravating circumstances necessary for imposition of the death penalty, (not found by the jury beyond a reasonable doubt) if a Defendant had a prior violent felony or a "murder committed during the course of a felony" aggravating circumstance. See *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003). [Holding "a prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by a unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions."]; *Robinson v. State*, WL 2004 170362 (Fla. 2004). The Florida Supreme Court also does not require a jury find beyond a reasonable doubt the underlying factors that a prior violent felony exists. See *Duest v. State*, 2003 Fla. LEXIS 1069.

However, the interpretation by the Florida Supreme Court regarding said issue is not unanimous among the Florida justices. For example, Justice Pariente stated in a recent concurring opinion, "I recognize that courts in other states have reached differing conclusions as to whether *Ring* requires more than a jury finding of a single death-qualifying aggravating circumstance.... However, unless and until the United States Supreme Court expands its holding in *Ring*, the death eligibility determination by a jury is the sole Sixth Amendment requirement I glean from *Ring*." Id. In contrast and in the same case,

Chief Justice Anstead stated, "*Ring* requires more from a jury than just finding the existence of a prior violent felony aggravator." For instance, Anstead held, "In effect, the Court's decision [in *Duest*] adopts a per se harmlessness rule as to *Apprendi* and *Ring* claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty." Id. Anstead further stated, "I believe this decision violates the core principle of *Ring* that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone...This violates the letter and spirit of *Ring*... and would make a mockery of the principle *Ring* stands for." Id.

Court authorities across the United States are split on the issue of whether *Ring* allows the trial judge to find and utilize aggravating circumstances to impose a death sentence if a prior violent felony or a "murder committed during the course of a felony" aggravator exists. For example, in *Johnson v. Nevada*, the Nevada Supreme Court determined *Ring* held "a capital sentencing scheme that places the determination of aggravating circumstances in the hands of a judge violates the Sixth Amendment right to a jury trial." 59 P. 3d 450 (Nev. 2002).

Moreover, after *Ring v. Arizona* was decided by the United States Supreme Court, the Arizona Supreme Court held in *Ring v. State*,

> "As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view however, "*Ring* II" should not be read so narrow. Although the Court there

> considered a death sentence based upon the existence of a single aggravating factor, we conclude that "*Ring* II" requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* II, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt." 65 P. 3d 915 (Ariz. 2003).

Petitioner contends the Florida Supreme Court's interpretation of *Torres* is incorrect. Said interpretation is incorrect because it allows a trial judge to unconstitutionally find the existence of aggravating circumstances beyond a prior violent felony or murder committed during the course of a felony. When the United States Supreme Court decided *Torres*, it did not intend for a trial judge in a capital case to find aggravating circumstances other than a prior conviction to use for imposition of the death penalty. The *Torres* decision was based on a non-capital case. Its holding does not claim a trial judge is allowed to find the existence of aggravating circumstances necessary to impose the death penalty, even if a prior violent felony exists. Rather, *Torres* holds only that "even though the statutory maximum of a statute could be increased by proof of the existence of a prior predicate conviction, such a conviction would not constitute an element of the crime triggering a right to proof beyond a reasonable doubt before a jury." *Apprendi*, 530 U.S. 466 (2000).

Petitioner further points to *Ring*, which applied the *Apprendi* case to capital defendants. The subsequent Court in *Ring* did not specifically state (or hold) whether the existence of a prior violent felony aggravator would allow a trial judge to constitutionally find and utilize any other aggravating circumstances to impose a death sentence. In fact, and in Petitioner's view; the *Ring* Court's reasoning was similar to Petitioner's current argument when it held,

"aggravating factors (emphasis on plural) operate as the functional equivalent of an element of a greater offense, and the Sixth Amendment requires that they be found by a jury." 536 U.S. 584 (2002). Petitioner contends the *Ring* Court, based on said language, held a jury must find the existence of all aggravating factors. This being true even when a particular defendant has an established prior violent felony aggravating circumstance. See 536 U.S. 584 (2002). Further, Petitioner believes *Sattazahn's* meaning behind "the jury finding existence of any aggravating circumstances" should be taken at face value, to wit: All aggravating circumstances, regardless of whether a defendant has a prior violent felony conviction or murder committed during the course of a felony for aggravation, must be found by a jury beyond a reasonable doubt. Petitioner states the United States Supreme Court should construe *Torres* as good law, because *Torres* was a "narrow exception" and therefore not meant to consider aggravating circumstances in a capital case.

In conclusion, the aforementioned United States Supreme Court holdings mean: If an aggravating circumstance is necessary, subsequently found, and utilized by a judge in imposing the death penalty; a constitutional violation has occurred. This continues to be true regardless of whether a defendant has a prior violent felony aggravator. See *Ring*, 536 U.S. 584 (2002); *Sattazahn*, 537 U.S. 101 (2002).

Furthermore, Petitioner asserts that if proof of underlying facts are necessary for an aggravating circumstances to exist, it follows the decision in *Almendarez-Torres* does not allow a trial judge to find any underlying facts necessary to prove said aggravating circumstances. Petitioner cites a federal court decision in *Breitweiser*, which held:

> "The Supreme Court in *Torres* was presumably thinking only of recidivist statutes that require a categorical approach with regard to the type of predicate offense that could trigger an enhancement. With such statutes, there would never be a question of fact as to whether the conviction had been proven, because any conclusion on that matter would constitute a question of law to be determined by the sentencing court. If a recidivist statute permitted enhancement based on proof of underlying conduct, however, factual questions could arise as to exactly what conduct the defendant engaged in. Typically such factual questions are within the province of a jury and this Court doubts that the Supreme Court would construe *Torres* as applying to such situations." *United States v. Breitweiser*, 220 F. Supp. 2d 1374 (N.D. Ga. 2002).

In apparent agreement *Breitweiser*, when faced with the issue of whether the Sixth and the Fourteenth Amendments require the jury, and not the trial judge to make findings that go beyond the mere fact that a prior conviction exists in order to apply the prior violent felony aggravator, the Tennessee Court of Criminal Appeals held:

> "If underlying facts are not found by the jury to find the existence of a prior violent felony aggravator, said aggravator could not be applied and the Defendant would be ineligible for the death penalty. As applicable to the case at bar, it was necessary to determine not only that the prior convictions existed, but also that they involved violence." *Tennessee v. Cole*, 2003 U.S. App. LEXIS 18111

The Tennessee Court's analysis of the issue acknowledged a disparity of views, citing Florida's view

as directly contrary to their own. Id. ["Some states have interpreted the United States Supreme Court's holding in *Ring* to allow a trial judge to determine factual issues relating to aggravating circumstances which involve prior convictions."] See *Belcher v. State*, 851 So. 2d 678 (Fla. 2003) ["Stating that the *Ring* holding allows a trial judge to determine factual issues relating to aggravating circumstances which involve prior convictions."] The Tennessee Court also noted this issue has not been "definitively" decided by the United States Supreme Court. Id. Lastly, the Court stated that when a trial judge examines the underlying facts (in a prior violent felony conviction), factually determines that a prior offense involved violence, and then based upon its finding of fact, instructs the jury as a matter of law that the prior felony involved violence, it is arguable that this usurps the role of the jury as trier of a fact. Id.

Said Tennessee Court represents the tip of the iceberg regarding the disagreement and disarray among both state and federal courts concerning *Torres'* application. See *Ring v. State*, 65 P. 3d 939 (Ariz. 2003). [Holding that "finding a prior violent felony conviction as an aggravating circumstance requires the judge to go beyond the mere fact that the prior conviction existed."]

Petitioner contends that since Florida's capital sentencing statute requires additional findings beyond the fact that a prior violent felony aggravator exists, these findings under *Ring* and *Apprendi* must be found by a jury beyond a reasonable doubt. In support, Petitioner first cites to Florida's capital sentencing scheme, which requires additional findings beyond the bare fact that a prior conviction exists before it can be used as an aggravating circumstance. Fla. Stat. 921.141(5). For example, the Florida Statute permits the finding of an aggravating circumstance where, "the defendant was previously convicted of

another capital felony or of a felony involving the use or threat of violence to the person." Id. Hence, other than a conviction of a capital felony, the trial judge must find that a felony conviction involved the use or threat of violence before this aggravating circumstance is proven." Id. Moreover, Florida case law suggests this aggravating circumstance often rests on factual determinations well beyond the mere existence of a prior conviction. See *Hess v. State*, 794 So. 2d 1249 (Fla., 2001); *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993); *Gore v. State*, 706 So. 2d 1328 (Fla. 1998).

Petitioner contends that since said Florida Statute requires underlying facts to be proven before a prior felony conviction aggravating circumstance can be used to impose the death penalty, the Florida Courts should have underlying facts be found by a jury in accordance with *Ring*. Also, in light of the pronounced "narrow holding" of *Torres*, Petitioner states that *Torres* is inapplicable to a jury finding of an "underlying circumstance" that a prior felony conviction aggravator exists in Florida. *Torres* only applies to the "bare fact" that a prior conviction exists. See *U.S. v. Breitweiser*, 220 F. Supp. 2d 1374 (Georgia Dist. Ct. 2002) [Holding "if a recidivist statute permitted enhancement based on proof of underlying conduct...factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury and this court doubts that the Supreme Court would construe *Torres* as applying to such situations."]

In conclusion, many lower courts in the state and federal jurisdictions are in conflict to the extent of *Torres*. This conflict is centered on the issues of: (1) The relationship of *Torres* to capital sentencing schemes; (2) the finding of aggravating circumstances when a prior felony aggravator exists; (3) whether *Torres* remains good law. See *U.S. v. Davis*, 260 F. 3d

965 (8th Cir. Ct. Appeals 2001). ["A close examination of Supreme Court cases cast further doubt on the future viability of *Almendarez-Torres*."]

Some courts (including Florida) hold that *Torres* means if a prior felony or murder committed during the course of a felony aggravator exists, a trial judge is allowed under *Torres* to constitutionally find other aggravating circumstances. These aggravating circumstances can then be utilized in imposing a death sentence. See *Bottoson v. Moore*, 824 So. 2d 115; *Belcher v. State*, 851 So. 2d 678 (Fla. 2003). [Concluding "*Ring* did not disturb the holding in *Apprendi*, which exempted prior convictions from facts required to be s ubmitted from the jury."]; *Duest v. State*, 2003 Fla. LEXIS 1069; *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003) [Holding "because one of the aggravating circumstances found was a prior violent felony, this aggravator alone clearly satisfies the mandates of the U.S. and Florida Constitutions, and therefore imposition of the death penalty was constitutional"]; *Colorado v. Carrasco*, 2003 Colo. App. LEXIS 1373. ["Defendant contends that *Ring* eliminates the prior conviction exception. We are not persuaded."]; *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2003). ["Once jury finds existence of a least one aggravating circumstance, judge may find other aggravating circumstances not found by jury to impose death."] In contrast, as mentioned earlier, other courts hold the direct opposite. See *Ring v. State*, 65 P. 3d 915 (Ariz. 2003), *Tennessee v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002.

As stated earlier, Florida courts and others have found under *Torres* that a trial judge can find the "underlying facts" of a prior conviction. This allows them to subsequently use said prior conviction as an aggravating circumstance necessary to impose a death sentence. Again, other courts hold the contrary. See *U.S. v. Breitweiser*, 220 F. Supp. 1374 (U.S. Dist. Ct.

Georgia 2002); *Tenn. v. Cole*, 2003 Tenn. Crim. App. LEXIS 1002. ["A disparity of different views exists as to whether the trial judge can decide issues which involve an examination of the underlying facts of a prior conviction."]

With no precise holding from the United States Supreme Court, various courts throughout the United States will continue to construe *Torres* incorrectly. The result will be unmistakable violations of the holdings in *Apprendi* and *Ring*, as well as Sixth, Eighth, and Fourteenth Amendment rights being violated.

In light of the preceding argument, Petitioner requests this Honorable Court grant this writ of certiorari, and further requests a determination of whether Petitioner's sentence and/or conviction was imposed unconstitutionally.

II. FLORIDA'S JUDICIAL WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IS A FACTUAL DETERMINATION THAT IS NECESSARY TO IMPOSE A SENTENCE OF DEATH IN FLORIDA. THEREFORE, UNDER *RING V. ARIZONA*, THIS "WEIGHING PROCESS" OF AGGRAVATING AND MITIGATING CIRCUMSTANCES SHOULD BE FOUND BY A JURY BEYOND A REASONABLE DOUBT.

Petitioner alleges Florida's capital sentencing statute, as it relates to the judicial finding of "fact" for weighing aggravating and mitigating circumstances, falls under the premise of *Ring* and *Apprendi*. 530 U.S. 466 (2000). [Holding "if a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt."]

In *Ring v. Arizona*, the United States Supreme Court held *Ring's* claim is tightly delineated when stating, "He contends only that the Sixth Amendment required jury findings on the aggravating circumstances against him." 536 U.S. 584 (2002). Further, the *Ring* court did not specifically rule on whether the "weighing process" of aggravating and mitigating factors is a "factual determination that makes an increase in a defendant's authorized sentence." Id. By not specifically identifying whether the weighing process is a factual determination necessary to increase a defendant's sentence (and therefore needs to be found by a jury beyond a reasonable doubt), the United States Supreme Court left this question open to much interpretation by the lower courts of the United States.

Petitioner contends the *Ring* holding applies to Florida's "weighing process" of aggravating and mitigating circumstances. In support, Petitioner first cites to Florida's ,capital sentencing statute, which allows a defendant's sentence to be increased from life to death only if: (1) The trial judge finds that aggravating circumstances exist and weighs the aggravating circumstances against the mitigating circumstances, and (2) finds there are insufficient mitigating circumstances to outweigh aggravating circumstances. Fla. Stat. 921.141 (3) (a) (b) (2003). Only if said two judicial determinations are accomplished can a defendant be sentenced to death. Id. Otherwise, a defendant faces only life imprisonment. Id. ["If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with 775.082."] In conclusion, Florida's capital sentencing statute requires a defendant receive sentence of life imprisonment unless the trial judge independently conducts a weighing analysis to

determine whether sufficient aggravating circumstances outweigh mitigating circumstances. Id.

It follows that since Florida law requires a judge to conduct a "weighing process" before a defendant can be sentenced to death, this "weighing process" falls under the ambit of *Ring* and *Apprendi*. 536 U.S. 584 (2002). ["If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no mater how the State labels it, must be found by a jury beyond a reasonable doubt."] It logically follows this fact-finding, to survive the constitutional requirements of the Sixth, Eighth, and Fourteenth Amendments, should be found by a jury beyond a reasonable doubt.

The Florida Supreme Court remains opposed to Petitioner's contention that the judicial "weighing process" must be found by a jury beyond a reasonable doubt under *Ring*. For instance, the Florida Supreme Court follows an Eleventh Circuit Court of Appeals opinion in *Ford v. Strickland*, which held:

> "The weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof...While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard...the relative weight is not." 696 F. 2d 804 (1995).

However, Petitioner contends the Florida Supreme Court is in error when it holds the "weighing process" is not a factual determination. Petitioner cites to the Florida capital sentencing statute itself. "If the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the *facts*: (1) That sufficient

aggravating circumstances exist as enumerated in subsection [5], and (2) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. 921.141 (2002).

Therefore, Florida's own capital sentencing statute holds death shall only be imposed if there are facts that insufficient mitigating circumstances outweigh the aggravating circumstances. Fla. Stat. 921.141 (2003). By its own statutory meaning, said Florida statute requires the trial judge to make a "factual determination" that "there are insufficient aggravators to outweigh mitigators." Id.

Other courts possessing similar capital sentencing language to Florida's have held the "weighing process" is a factual determination subject to a jury determination under *Ring*. For instance, *Johnson v. Nevada* found that Nevada statutory law requires two distinct findings to render a defendant "death-eligible." Id. In particular, the jury panel of judges may impose a sentence of death only if: (1) it finds at least one aggravating circumstance and (2) further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. Id. The *Johnson* court then held that "this second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, and not merely a discretionary weighing." 59 P. 3d 450 Nev. 2002. The court reasoned that since Nevada's weighing process was required to be made by a jury, because Nevada "made an increase in a defendant's authorized punishment contingent on the finding of a fact, and that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt." Id.

The Florida capital sentencing statute requires a factual judicial finding of insufficient mitigators to

outweigh aggravators before death can be imposed. Therefore, the Florida Supreme Court should apply the holding in *Ring* to make this weighing process done and proven by a jury beyond a reasonable doubt. 536 U.S. 584 (2002). [Holding, "the right to a jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both."]

Furthermore, the issue regarding whether the weighing process is a factual determination (that needs to be found by a jury beyond a reasonable doubt) is currently being interpreted throughout the United States in conflicting ways. These conflicting interpretations are happening amongst both the state and federal Courts. Said conflict between the courts cannot be resolved in the future without a specific United States Supreme Court ruling. Below are cases Petitioner claims are in direct conflict with one another regarding this issue. As previously stated, it has been held in the Supreme Court of Nevada that the actual weighing process of aggravating and mitigating circumstances is a factual determination under *Ring* and *Apprendi* that must be proven by a jury beyond a reasonable doubt. *Johnson v. Nevada*, 59 P. 3d 450 (Nev. 2002). In contrast is the Court of Appeals of Maryland, *State v. Oken*, 367 Md. 191 (Md. Ct. App. 2001). [Holding "the "weighing process" itself is not a factual determination, and not a "finding" for purposes of *Apprendi*."]; *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2003). ["Also, the weighing process is not a factual determination nor an element of an offense, therefore the jury is not constitutionally obligated to weigh the aggravating and mitigating beyond a reasonable doubt."]; *Brice v. State*, 815 A. 2d 314 (Del.2002). ["The weighing of aggravating

circumstances doesn't increase the punishment, the U.S. Supreme Court does not require a jury finding beyond a reasonable doubt that all aggravating factors found to exist outweigh all mitigating factors found to exist."]; *Woodruff v. State*, 1993 OKCR7. ["The determination of weight to be accorded to the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt."]; *Harrison v. State*, 2003 Ala. Crim. App. LEXIS 22. ["The weighing process (of aggravating and mitigating circumstances) is not a factual determination."]; *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983). ["First, that the aggravating factors must outweigh the mitigating factors for imposition of the death penalty under the Florida Statute is not an element of the crime of capital murder in Florida."] These cases represent a small fraction of varying interpretations. If a specific United States Supreme Court ruling is not made, it seems this conflict between the courts will never be resolved.

Lastly, the issue of a "weighing process" is of great national importance. Without a direct ruling on the issue by the United States Supreme Court, any defendant accused of a capital crime could face the possibility of his or her Sixth Amendment rights under the United States Constitution being violated. Further, if this factual determination of finding aggravating circumstances to outweigh mitigating circumstances was performed by a jury, it would help dilute the argument that the death penalty can be imposed arbitrarily. This is because the defendant would then know exactly what aggravating and mitigating factors were found by a jury, who alone has the constitutional responsibility to find the existence of "any fact that increases a defendant's authorized punishment." See *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, since "death is different," more precaution and guidance should be given to the lower courts. Without guidance, conflicting decisions among

the lower courts will become commonplace, thereby undermining public confidence of America's death penalty schemes.

Based on the above, Petitioner requests the Court grant this Writ of Certiorari to determine whether his sentence and conviction is rested on unconstitutional grounds under the Sixth, Eighth, and Fourteenth Amendments. A determination needs to be made on whether a trial judge, (and not a jury) can independently weigh aggravating and mitigating circumstances, and thereby utilize said weighing process to impose a sentence of death.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court grant Petitioner's Writ of Certiorari. Petitioner requests this Court vacate and remand to the Florida Supreme Court for reconsideration in light of this Court's holdings of *Ring v. Arizona*, *Sattazahn v. Pennsylvania*, and *Apprendi v. New Jersey*.

Respectfully Submitted,

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Supreme Court of Florida

No. SC01-2007

JOHN D. FREEMAN,
Appellant,

vs.

STATE OF FLORIDA
Appellee

[July 11, 2003]

PER CURIAM.

John D. Freeman (Freeman), a death row inmate, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. See art. V, § 3 (b) (1), Fla. Const. For the reasons more fully set forth below, we affirm the trial court's denial of relief.

The facts, as set forth in Freeman v. State, 761 So. 2d 1055 (Fla. 2000), are as follows:

> John D. Freeman (Freeman) was convicted of first-degree felony murder for the 1986 killing of Leonard Collier (Collier). Freeman was sentenced to death, and both the conviction and sentence were affirmed on appeal. See Freeman v. State, 563 So. 2d 73 (Fla. 1990). Collier caught Freeman in the act of burglarizing his home. Freeman claimed that Collier pointed a gun at him and threatened to shoot him to prevent his escape. The two struggled over the gun and fell outside into the front yard. When Freeman obtained possession of the gun, he used the gun to repeatedly strike Collier in the head ten to twelve times. Collier died from the head wounds. Id. at 1058.

The Collier murder was the second murder that Freeman committed within twenty-two days. The first murder in a similar manner--the victim, Alvin Epps (Epps), came home to find Freeman burglarizing his home and Freeman stabbed him to death. In the Epps case, Freeman was convicted of first-degree murder, the jury recommended a life sentence, the judge overrode the jury recommendation, and this Court reversed the override. Freeman v. State, 547 So. 2d 125 (Fla. 1989).

After Freeman's direct appeal was concluded in the Collier murder, he filed a motion for postconviction relief, which the trial court

summarily denied. See Freeman v. State, 761 So. 2d 1055 (Fla. 2000). Freeman appealed the summary denial of his postconviction motion to this Court, and also filed a petition for a writ of habeas corpus. The cases were consolidated for our consideration. After considering Freeman's appeal, we remanded Freeman's 3.850 motion for an evidentiary hearing on his claim of ineffective assistance of counsel. See id. In all other respects, we affirmed the trial court's denial of Freeman's postconviction motion. We also denied Freeman's petition for a writ of habeas corpus. See id.

The trial court conducted an evidentiary hearing on the remanded claim and denied relief. Freeman now appeals that denial, raising two claims of ineffective assistance of counsel: whether trial counsel was ineffective in the guilt phase of trial for failing to object to the State's alleged improper reliance on racial factors in seeking the death penalty, and whether trial counsel was ineffective in the penalty phase trial for failure to present evidence in mitigation. For the reasons explained below, we affirm the trial court's denial of relief.

Ineffective Assistance at Guilt Phase Trial

Freeman alleges defense counsel was ineffective for failing to argue that the State's decision to pursue the death penalty was based upon improper racial considerations. He claims the prosecutor rejected Freeman's offer to plead guilty in the Epps and Collier cases in exchange for two consecutive life sentences because the State needed to seek the death penalty in more

cases where Caucasian defendants killed African-American victims.

Although the decision to seek the death penalty is within the prosecutor's discretion, that discretion may be curbed by the judiciary where motives such as bad faith, race, religion, or a desire to prevent the defendant from exercising his constitutional rights contributes to the prosecutor's decision. See State v. Bloom, 497 So. 2d 2, 3, (Fla. 1986). Freeman claims that race was the motive behind the prosecutor's decision to seek the death penalty in this case.

At the evidentiary hearing, Freeman presented the testimony of then Assistant State Attorney John Bradford Stetson, Jr., State Attorney Ed Austin, Assistant Public Defender Ann Finnell (who was Freeman's co-counsel at the Epps trial), and Assistant Public Defender Patrick McGuinness (Freeman's trial counsel for both the Collier and Epps murders). The testimony showed that prior to trial, Freeman's trial counsel approached the prosecutor with an offer to plead guilty to both the Epps and Collier murders in exchange for two consecutive life sentences with twenty-five-year mandatory minimum terms. The testimony showed that both parties were aware of the then pending federal case, McCleskey v. Kemp, 481 U.S. 279 (1987). McCleskey involved an allegation that prosecutors were seeking the death penalty disproportionally against African-American defendants. Freeman alleges that when his trial counsel presented the plea offer to the prosecutor, the prosecutor refused the offer for fear that defense attorneys in other cases would argue that he was favoring Caucasian defendants.

Freeman argues that the State relied on race in making its decision, that the reliance created a reverse-McCleskey claim, and that trial counsel was ineffective for failing to raise the claim because he admittedly did not know how to do so.

The trial court found that, although the prosecutor's response to defense counsel's plea offer was "a somewhat ill-considered retort," the evidence demonstrated that the State did not pursue the death penalty based on Freeman's race. The evidence the trial court relied upon included the testimony of Ed Austin, the State Attorney at the time of trial. Austin stated that his office never prosecuted a defendant based on his or her race. At the time of Freeman's trial it was standard policy for him to discuss the case with the prosecutor and determine the elements of the crime, the aggravation and mitigation, and whether the State should go forward and seek the death penalty. Austin commented on the ongoing accusations that his office too often sought the death penalty in cases where the victims were Caucasian and the defendants were African-American. He stated there were a lot of newspaper articles criticizing the State Attorney's Office, but those accusations had nothing to do with the decision to file and prosecute a homicide as a first-degree murder case. The decision to seek the death penalty, Austin stated, was made on the basis of the facts of the case. When Austin was asked about the public's perception of the State Attorney's Office, he stated that perceptions have nothing to do with how a case is prosecuted, or the decision to seek the death penalty, or whether there is aggravation that outweighs mitigation. Austin stated that the only time race

is considered in the prosecution is if race is an element of the crime, and that during his tenure as a State Attorney, his office never filed a case for the wrong reasons. The cases were filed based on the law. Prosecutor Stetson also testified at the evidentiary hearing. He stated that under the facts of this case, irrespective of race, the aggravating circumstances clearly supported the decision to seek the death penalty.

For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to finding of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 2000) (setting forth standard of appellate review following an evidentiary hearing on motion based on ineffective assistance of counsel claims); see also State v. Reichmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000) ("[W]e review the prongs of ... ineffective assistance of counsel as questions of mixed law and fact."). Therefore, we give deference to the finding of fact regarding the conversations between the prosecutor and defense counsel, the conversations between the prosecutor and the State Attorney, and the testimony as to how and why the State chose to seek the death penalty in this case. The trial court's finding that the State did not prosecute Freeman because of his race is based on competent, substantial evidence in the record.

Next, we review whether these findings constitute a deficiency in performance that

prejudiced Freeman. This Court reviews de novo the issue of whether defense counsel was deficient at trial and, if so, whether the defendant was prejudiced. See Stephens, 748 So. 2d at 1033-34. Freeman argues that defense counsel was ineffective because he admittedly did not know what legal mechanism to employ to address the issue of the prosecutor's perceived reliance on race as a factor in the decision to seek the death penalty.

As stated in Stewart v. State, 801 So. 2d 59, 64-65 (Fla. 2001), for a defendant to succeed in his ineffectiveness claim, he must satisfy two elements: first, he must show that counsel's performance was deficient; and second, he must show that the deficient performance prejudiced the defense. In order to prove these elements, a defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that counsel's errors were so serious as to deprive the defendant of a fair trial where the result was reliable. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Stewart, 801 So. 2d at 65; see also Strickland, 466 U.S. at 697 ("[T]here is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."); Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong).

Even if we assume defense counsel was deficient in his inability to address this issue at the time of trial, Freeman has failed to establish that the State relied on race when it decided to seek the death penalty, and thus has not demonstrated prejudice. The testimony establishes only that the prosecutor was aware of the McCleskey issue and perceptions and accusations made about his office. State Attorney Austin confirmed that race was not a factor in deciding to seek the death penalty in Freeman's case. The trial court accepted this testimony as true, and there is nothing in the record to refute it. The trial court's finding that the prosecutor did not rely on this defendant's race in seeking the death penalty is supported by the competent, substantial evidence in the record. Therefore, we find no error in the trial court's denial of relief on this claim.

Ineffective Assistance of Counsel at the Penalty Phase Trial

Freeman claims defense counsel was ineffective in the penalty phase trial for failing to investigate and present to the jury mitigating evidence from friends and family about Freeman's abusive home life, for failing to have mental health experts review his family history and present this evidence along with evidence of alcohol and drug abuse, and for failing to present the live testimony of David Sorrells, Freeman's best friend, who would have testified to abuse Freeman suffered as a child.

As stated above, for Freeman to succeed on an ineffectiveness claim, two elements must be satisfied. First, he must show that counsel's performance was deficient, or that counsel made errors so serious that he or she did not function as the "counsel" guaranteed by the Sixth Amendment. Second, he must show that the deficient performance prejudiced the defense. See Stewart v. State, 801 So. 2d 59, 64-65 (Fla.2001). This second prong requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). The trial court considered each of the alleged deficiencies and found that trial counsel was not deficient. We agree.

Lay Witnesses

Defense counsel McGuinness testified at the evidentiary hearing that he made the decision present the same mitigation at this trial as he presented in the Epps trial, in the Epps trial, the jury recommended a sentence of life imprisonment. The only witnesses he called in the penalty phase were Mary Freeman (Freeman's mother), Robert Jewell (Freeman's brother), and David Sorrells (Freeman's friend). Sorrells did not testify live at trial, but the transcript of his testimony from the Epps trial was read to the jury. Defense counsel stated that he believed part of the evidence in the penalty phase trial included evidence that Freeman was abused by his stepfather. As for evidence that Freeman's sister was sexually abused by Freeman's stepfather,

defense counsel testified that he did not have this information, and he admitted he never spoke to Freeman's sister. He stated that he would have put on evidence of sexual abuse only if he could have linked it to Freeman. He also stated that he knew of Freeman's use of drugs and alcohol, but did not use that information in mitigation because he could not link it to the crime. He admitted that perhaps he should have "delved" more deeply into Freeman's drug and alcohol abuse.

Freeman argues that defense counsel should have presented more evidence in mitigation, arguing that the result at trial would have been different if the jury had heard about the scope of physical and sexual abuse in the Freeman household.

The facts do not support the allegation that Freeman was sexually abused or was aware that his sister was sexually abused. To find that trial counsel was deficient in failing to present evidence of physical and sexual abuse, Freeman must first show that a reasonable investigation would have uncovered the evidence. See Gorby v. State, 819 So. 2d 664, 676 n.11 (Fla. 2002) (finding that trial counsel was not ineffective for not presenting evidence of the defendant's childhood sexual abuse where there was no evidence that such abuse occurred). The record in this case does not demonstrate that any of the witnesses or potential witnesses knew of the evidence of sexual abuse or would have told defense counsel about it if they did know. Freeman's sister testified at the evidentiary hearing that she kept the abuse to herself until

"later." She testified that her mother knew of the abuse at the time of Freeman's trial, but Freeman's mother did not volunteer this information to counsel.

The trial court found that the testimony presented at the evidentiary hearing did not demonstrate physical abuse to the extent that Freeman claims it occurred during his childhood. Each witness testified to single incidents of punishment that each said occurred after Freeman misbehaved. The trial court acknowledged the testimony of Freeman's neighbors, Mary Holliman and Bobbie Hart, who both described an incident where Freeman was whipped with a rubber hose. However, the severity of Freeman's claimed abuse was tempered by the testimony of Mitchell Tanner and Dwayne Watson, who stated that Freeman grew up like "all the rest of us," that Freeman got into trouble and stayed out with his friends past his curfew, and that Freeman knew when he went home he would have to face his stepfather. Freeman's neighbor, James Holliman, testified that he would hear Freeman and his brother yell, "I won't do it anymore." And Freeman's aunt, Sonja Bigdon, testified that Freeman's stepfather yelled, as did Freeman's mother, but that his stepfather loved Freeman in his own way and was good to Freeman at times.

While additional evidence regarding specific examples of abuse could have been presented, that is not the standard Strickland contemplates in evaluating counsel's performance. See Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not

ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation); see also Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000) ("[E]ven if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative ... Although witnesses provided specific instances of the abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury.").

The trial court acknowledged that the witnesses' combined testimony demonstrated that Freeman's stepfather was overly zealous in his punishment, but the court also noted that the punishment described in the testimony was in response to Freeman's misbehavior. Further, as the trial court found, the information presented at the evidentiary hearing was "largely cumulative" to that evidence presented at trial, and that the combined testimony would not have outweighed the statutory aggravating circumstances.

It is clear that the testimony that Freeman suffered some physical abuse at the hand of his stepfather. In fact, the jury recommendation of life in the Epps trial was based in part on the "history of abuse during Freeman's childhood." Freeman, 547 So. 2d at 129. However, the fact that Freeman was physically abused by his stepfather was a fact made clear to this jury at trial. Freeman's brother and mother, as well as Dr. Louis Legum, a mental health expert, told the jury that Freeman was abused by his stepfather. In fact, the trial court accepted the nonstatutory

mitigating factor of abuse by Freeman's stepfather.

Although the evidence presented at the postconviction hearing may have painted a clearer picture as to the extent of the abuse, trial counsel is not ineffective if he adequately made the point. See Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991) ("It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if he believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position."). Even if counsel's failure to demonstrate the abuse with greater detail can be considered error, it would be harmless because the abuse Freeman suffered as a child was found as a mitigating factor.

Expert Testimony

Freeman also called a number of friends and family members to testify at the evidentiary hearing. The testimony showed that Freeman suffered a head injury when a neighbor accidental backed over him with a car when he was about two years old, and another head injury after falling off a bicycle. At the evidentiary hearing, defense counsel testified that there were no medical records available to indicate the nature or severity of either of the head injuries, the hospital records had been destroyed, and the treating physician had no recollection of the injuries. Freeman then presented Dr. James E. Larson as an expert witness in forensic psychology to testify that Freeman suffered from a "mild neuropsychological impairment" and a "learning

disability." Dr. Larson administered certain tests to Freeman and testified that Freeman performed poorly.

The trial court found that there was no materially significant information Dr. Larson possessed that defense counsel did not provide Dr. Legum at trial. The trial court also held that because Dr. Legum did not testify at the evidentiary hearing, there was no evidence that Dr. Legum's testimony at trial would have been any different had he been given Dr. Larson's information. Based on these facts, the trial court found that there was no showing that trial counsel was deficient. See Porter v. State, 788 So. 2d 917 (Fla. 2001) (finding that this Court will not substitute its judgment for trial court's judgment on questions of fact, credibility of witnesses, and weight of evidence); see also Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Whitfield v. State 706 So. 2d 1 (Fla. 1997).

The trial court then considered the second prong in Strickland and held that Freeman demonstrated no prejudice. The trial court found that Dr. Larson's opinion that Freeman possessed a "mild neuropsychological impairment" was based on his speculative assessment of a combination of factors, which was subject to impeachment by the State. Furthermore, both Dr. Larson and Dr. Legum would have testified that Freeman suffered from "anti-social personality disorder" which is a trait most jurors tend to look disfavorably upon. At best, the trial court found, Dr. Larson's testimony would have established nonstatutory mitigation. See Blackwood v. State, 777 So. 2d 3999 (Fla. 2000)

(finding that trial court properly rejected statutory mental mitigators where mental health expert testified that defendant suffered from mental disturbance which was not extreme"); see also Mahn v. State, 714 So. 2d 391 (Fla. 1998); Foster v. State, 679 So. 2d 747 (Fla. 1996); Johnson v. State, 660 So. 2d 637 (Fla. 1995). The trial court concluded that Freeman's claim failed both prongs of the Strickland test for ineffective assistance of counsel.

We accord to the trial court's findings of fact, and will uphold them if the facts are based on competent, substantial evidence. See Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999). The facts the trial court relied upon are supported by competent, substantial evidence in the record. Defense counsel testified at the postconviction hearing that he provided Dr. Legum with Freeman's school records, juvenile records, background information from his files, and any other information he obtained as he acquired it. Defense counsel informed Dr. Legum that Freeman was sent to the hospital on a suicide watch prior to trial. Dr. Larson's testimony as the postconviction hearing was substantially similar to Dr. Legum's testimony at trial. Both experts testified to Freeman's IQ, intellectual capabilities, and performance on achievement tests. The fact that Freeman found a new expert to provide more favorable mental health testimony does not, in itself, render trial counsel deficient. See Gaskin v. State, 822 So. 2d 1243 (Fla. 2002) (holding counsel's reasonable mental health investigation was not rendered incompetent merely because defendant later secured testimony of more favorable mental health expert and where expert's

opinion at evidentiary hearing was cumulative to that already presented to trial court.

The trial court's finding that Freeman's school records, juvenile records, and other information in trial counsel's files were given to the trial expert is supported by the competent, substantial evidence in the record based on trial counsel's own testimony that he provided this information. The facts in the record do not support Freeman's claim that his trial counsel was deficient in failing to provide the trial expert with pertinent background information, and relief on this claim is therefore denied.

Failure to Subpoena David Sorrells

Freeman claims that is was crucial to his defense that David Sorrells, his best friend from childhood, testify live at his trial. Sorrells testified live at the Epps trial. Defense counsel did not subpoena Sorrells for trial in this case because he perceived Sorrells as a friendly witness and expected Sorrells would testify voluntarily. However, when the penalty phase trial began, defense counsel could not locate Sorrells. Counsel sent Freeman's brother to Sorrells' house and left a message with Sorrells' girlfriend. Counsel sought a continuance to find Sorrells and bring him into the courtroom to testify, telling the judge that he knew where Sorrells worked and could find him there. However, because Sorrells had not been subpoenaed, the trial judge refused to continue the penalty phase trial. The trial judge had

counsel read Sorrells' testimony from the Epps trial to the jury, and instructed the jury to accept the testimony as if Sorrells has presented it live.

Sorrells testified at the evidentiary hearing. He stated that he had not been contacted to testify at the trial, but would have done so. Freeman now argues that Sorrell's testimony should have been presented live, and when considered in conjunction with the failure of trial counsel to present other lay testimony, there was clear prejudice. He argues that without Sorrells' testimony along with the testimony of other friends and neighbors, the jury believed that only family members were willing to testify favorably about his character, and the jury never understood that he is a human being with positive characteristics.

Sorrells testified at the Epps trial about two incidents of physical abuse Freeman suffered. At the evidentiary hearing Sorrells stated that had be been called as a live witness, he would also have testified that Freeman was a hard worker, Freeman enjoyed children, and he was well-mannered. He would have also added that Freeman's stepfather was "a pretty rowdy fella."

Counsel's failure to subpoena a defense witness is not prejudicial where the testimony is presented to the jury by other evidence. See Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992) (rejecting a claim of ineffectiveness of counsel for failure to subpoena defense witness because, when witness failed to appear, trial counsel was able to get testimony before jury by way of stipulation). In this case, Sorrells'

testimony was presented by reading the transcript of his prior testimony.

Furthermore, as the trial court found, trial counsel's failure to subpoena Sorrells was a tactical decision to prevent the State from knowing who the defense witnesses were. Although trial counsel stated that he did not subpoena Sorrells because he thought Sorrells would voluntarily appear, he also stated that, at the time of this trial, there was no discovery regarding penalty phase witnesses and if he did not subpoena a witness, the prosecutor would not know who his witnesses would be. Trial counsel stated, "I saw no reason to assist the State in preparing to meet any of my witnesses." Thus, the trial court's finding that this was a tactical reason is supported in the record.

As this court stated in Occhicone v. State, 768 So. 2d 1037 (Fla. 2000):

> In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

Id. at 1049 (quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). The evidence Freeman now presents as evidence in mitigation would not alter the balance of the aggravating and mitigating circumstances. There were three aggravating circumstances found: (1) Freeman was previously convicted of first-degree murder, armed robbery, and burglary of a dwelling with an assault (the Epps case); (2) Freeman committed the Collier murder during the commission of a burglary of a dwelling; and (3) Freeman committed the crime for pecuniary gain. There were no statutory mitigators found. Four nonstatutory mitigators were found: (1) Freeman was of low intelligence; (2) he had been abused by his stepfather; (3) he possessed some artistic ability; (4) he enjoyed playing with children. Every item Freeman presents as mitigation in this postconviction proceeding was considered by the jury at trial. The fact that Freeman's postconviction counsel can support the mitigation with stronger evidence would not, with reasonable probability, alter the balance of the aggravating and mitigating circumstances. The trial court properly denied relief on this claim.

Therefore, based on the foregoing, we hereby affirm the trial court's denial of postconviction relief.

It is so ordered.

ANSTEAD, C.J., WELLS, PARIENTE, LEWIS, QUINCE, and CANTERO, JJ., and SHAW, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,

Donald R. Moran, Jr., Judge - Case No. 86-11599-CFA

Michael P. Reiter, Capital Collateral Regional Counsel - North, Harry P. Brody, Assistant CCRC - N and Jeffrey M. Hazen, Assistant CCRC - N, Office of the Capital Collateral Regional Counsel, Jacksonville, Florida,

for Appellant

Charles J. Crist, Jr., Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT,
FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY,
FLORIDA.

CASE NO.: 86-11599-CF
DIVISION: CR-E

STATE OF FLORIDA,
Petitioner,

v.

JOHN D. FREEMAN
Defendant.
_____/

SECOND ORDER DENYING DEFENDANT'S FIRST MOTION FOR POST-CONVICTION RELIEF

This matter is before this Court on the defendant's "Amended Motion To Vacate Judgments of Conviction and Sentence" filed on October 25, 1995, upon remand by the Supreme Court of Florida in Freeman v. State, 761 So. 2d 1055 (Fla. 2000)(Mandate issued on July 10, 2000), for the purpose of holding an evidentiary hearing on the specific matters set forth in this opinion. As a result of this Court's substantial accommodations to the defendant, the evidentiary hearing was finally held on July 16 - 17, 2001.

The Supreme Court of Florida's opinion set forth five issues that the defendant could present

evidence in support of at the evidentiary hearing, all of which are related to the penalty phase of the trial. Four of the issues relate to the assistance of his two trial counsel and one of the issues is a due process issue related to the State's decision to pursue the death penalty. This Court will address each of the issues in the approximate order in which they were addressed at the evidentiary hearing.

ISSUE ONE

The defendant raised the due process allegation that the State improperly used race as a motivating factor in deciding to pursue a death sentence in this case. In order to prevail on this claim, the defendant was required to show that the State used the defendant's race as a motive for seeking the death penalty. Freeman, 761 So. 2d at 1068; McClesky v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987).

The defendant presented the testimony of then Assistant State Attorney (now Circuit Court Judge) John Bradford Stetson, Jr., then State Attorney Ed Austin, Assistant Public Defender Ann Finnell (who was the defendant's co-counsel on the Epps murder), and Assistant Public Defender Patrick McGuinness (who was the defendant's lead trial counsel on both the Epps and the Collier murders) as to this issue. The testimony of these witnesses established that as a result of the strength of the State's case as to the Collier murder, and the likelihood of a death sentence in that case, Mr. McGuinness went to Mr. Stetson and proposed a plea agreement as to both murder cases, whereby the defendant would

plead guilty to both murders and be sentenced to consecutive life sentences with 25 year minimum mandatory terms. The testimony established an awareness by counsel for the parties of then pending Federal litigation in which studies were used to support an allegation that prosecutors were seeking the death penalty disproportionally against black defendants. Ms. Finnell and Mr. McGuinness testified that Mr. Stetson responded to the defendant's plea offer by stating that if he accepted the offer, counsel for the defense would use that fact to support future allegations of discriminatory application of the death penalty against black defendants.

Even assuming that Mr. Stetson responded to the defendant's plea offer as Mr. McGuinness indicated, this Court finds that the response was nothing more than a somewhat ill-considered retort to then existing allegations of racial discrimination in the application of the death penalty by prosecutors (of an opposite nature to the instant facts), and that the evidence not only failed to demonstrate a racially motivated purpose in pursuing the death penalty in this case, but rather, it demonstrated that the State Attorney's Office did not pursue the death penalty in this case based on the race of this defendant (who is white). The testimony of Mr. Stetson and Mr. Austin established that as a matter of established office policy the decision to pursue a First Degree Murder charge and a death sentence was the result of a review of the facts of the case and the aggravating factors of the case by the State Attorney's Office's "Homicide Team." The Homicide Team was compromised of Division Chiefs and the senior homicide prosecutors

within the office. Mr. Stetson testified that the Homicide Team voted unanimously to seek the death penalty in light of the strength of the facts and the aggravating circumstances in this case. This was the *second* case in which this defendant went to the home of an innocent home owner with the intent to burglarize the home and then brutally murdered the home owner while committing the burglary. The Homicide Team's recommendation was then subject to review by the State Attorney. Mr. Austin testified that his office never prosecuted a defendant because the defendant was white or black, and that he did not allow public sentiment to influence the prosecution of cases. This Court finds that the evidence refutes the defendant's claim that the State used his race as a motivation for pursuing the death penalty.

ISSUE TWO

That the defendant's attorneys rendered ineffective assistance of counsel by allegedly failing to adequately provide his mental health expert with sufficient information to allow the expert to provide a competent evaluation. In order to prevail on a claim of ineffective assistance of counsel it is the defendant's burden to show: 1. That counsel's performance was outside the wide range of reasonable professional assistance, i.e., that no reasonable attorney would have done what counsel did under the circumstances; and 2. That counsel's deficient performance prejudiced the outcome of the proceeding, i.e., that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's

deficient performance. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1986); Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994); Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

The defendant presented the testimony of a number of family members and family friends that the defendant had suffered a "head injury" as a result of a neighbor accidentally backing over him with a car when he was approximately two years of age, and that he suffered another head injury when he fell off a bicycle when he was a child. However, there were no medical records available to indicate the nature or severity of either of these head injuries. The defendant then used the testimony of Dr. James E. Larson (whom the Court accepted as an expert in forensic psychology) to note the defendant's poor performance in school and his performance on tests administered by Dr. Larson and his staff some six years after the offense in this case. Dr. Larson offered his opinion, through his assessment of the combined effects of all the circumstances brought to his attention (including his examination of the defendant), that the defendant possessed a "mild neuropsychological impairment," as well as a "learning disability." However, Dr. Larson also acknowledged that he is not a medical doctor nor a neurologist, and he stated his belief that his evaluation of a brain disorder was more accurate than would be actual medical evidence.

Initially, this Court finds that the evidence not only failed to establish that counsel's

performance was deficient, it refuted that claim. The State presented the testimony of Mr. McGuinness, the defendant's trial counsel. Mr. McGuinness delineated what information he had provided to the defendant's mental health expert, Dr. Louis Legum. This Court finds that there was no materially significant information that was presented at the hearing that was not presented to Dr. Legum. Moreover, the defendant failed to call Dr. Legum as a witness at the hearing, for the purpose of establishing that the proffered evidence had not been presented to him, *or* that the allegedly unknown information would have altered Dr. Legum's testimony at the time of the defendant's trial. Indeed, the defendant presented no evidence that Dr. Legum's evaluation or opinions were actually incompetent. The fact that the defendant has now found a different expert who is willing to provide opinions that may be mildly favorable to him is of no moment, as that fact does not demonstrate incompetence on the part of either his attorney or his mental health expert. Porter v. State, 26 Fla. L. Weekly S321, 2001 WL 459872 (Fla. May 3, 2001); Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Whitfield v. State, 706 So. 2d 1 (1998).

Additionally, this Court finds that the defendant has failed to show actual prejudice as a result of this claim. Dr. Larson's opinions would have, at best, established non-statutory mitigation and not statutory mitigation. Blackwood v. State, 777 So. 2d 399 (Fla. 2000); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Foster v. State, 679 So. 2d 747 (Fla. 1996); Johnson v. State, 660 So. 2d 637 (Fla. 1995). Indeed, Dr. Larson's opinion that the defendant possessed a

"mild neuropsychological impairment" was based on his (speculative) assessment of a combination of factors, which assessment was subjected to impeachment by the State. There was absolutely no medical evidence in support of his assessment and there was evidence in the defendant's school records which refuted the assessment. Additionally, a jury would have heard testimony from both Dr. Legum and Dr. Larson that the defendant has an "anti-social personality disorder," a trait that *jurors* do not tend to look favorably upon, even if the courts are willing to consider the trait as a potentially mitigating circumstance. Therefore, this Court finds that there is no reasonable probability that the jury would have recommended a life sentence if it had been presented with the facts considered by and opinions of Dr. Larson. Assay v. State, 769 So. 2d 974 (Fla. 2000).

ISSUE THREE

That counsel allegedly rendered ineffective assistance of counsel by failing to present expert testimony regarding the effects of his "drug and alcohol abuse." The defendant presented the testimony of family members and family friends that the defendant *used* alcohol, marijuana and cocaine, but there was no testimony as to how often or for how long the defendant used alcohol or drugs, such that the evidence established actual alcohol or drug abuse. Indeed, the witnesses who testified regarding the drinking with the defendant did *not* characterize the defendant's alcohol usage as somehow excessive.

First, this Court finds that the evidence refuted the defendant's claim that counsel's

performance was deficient in failing to even present evidence that the defendant used or abused alcohol or drugs. Counsel testified that he was aware of the defendant's use of alcohol and drugs, including the fact that the defendant had smoked a marijuana cigarette on the morning of the murder. However, counsel also testified that he chose not to present evidence of the defendant's alcohol and *illegal* drug usage, because jurors do not look favorably upon such information, and because he had nothing with which to connect that information to the defendant's commission of the instant offense, such that *jurors* might find that information favorable to the defendant, as opposed to unfavorable. Counsel testified that the defendant had no prior alcohol or drug related offenses and that the defendant had only smoked *a* marijuana cigarette on the morning of the offense, and not at the time of the offense. Additionally, counsel testified that his theory of the defense was that the defendant was engaging in rational thought and that the defendant did not intend to kill the victim, as was evidenced by the fact that the defendant did not shoot the victim when he obtained possession of the firearm, but rather, he hit the victim in a claimed attempt to get away from the victim. Given this theory, counsel argued that the jury should only find the defendant guilty of second degree murder. Presenting evidence of the defendant's illegal drug usage would have been diametrically opposed to the defense's assertion of rational thought. This Court finds that counsel's strategic decision not to present evidence of the defendant's alcohol and drug abuse was reasonable under the facts of this case. Maharaj v. State, 778 So. 2d 944, 951 (Fla.

2000)(stating, "In *Medina v. State*, 573 So. 2d 293, 297 (Fla. 1990), this Court recognized that counsel cannot be ineffective for strategic decision made during a trial.").

Second, this Court will also note that the defendant did not present testimony at the evidentiary hearing from an expert to testify regarding the effects of the defendant's alcohol and drug abuse. This Court finds that the defendant failed to prove that counsel's performance was deficient for this reason as well.

ISSUE FOUR

That counsel was ineffective for failing to present the testimony of friends and neighbors regarding the defendant's abusive childhood, at the hands of his stepfather, Charles Sorrels (who is no longer living). The Supreme Court of Florida specifically noted (in footnote nine, at pages 1064-1065 of its opinion), the allegation that the defendant suffered a severe head injury as a child when he was run over by a car; as well as the fact that there was nothing in the record to show whether counsel was aware of this information, or if counsel made a strategic decision not to use it.

As to the allegation of child abuse (as presented through the testimony of Mary Holliman, Danette Rucker, Sherry Raymond, Faith McQueen, James Holliman, Joanne Sorrells, Zack Marchalleck, Mitchell Tanner, Bobbie Hart, and Sonja Bigdon), this Court will note that while a combination of the respective testimony may have established overzealous punishment by the defendant's stepfather, most

of the witnesses, including the defendant's neighbors (Mary Holliman and Bobbie Hart) only testified regarding single incidents of extreme punishment (most of which were in regard to the same act of whipping the defendant with a rubber hose). The majority of those incidents were testified to, in total, by defendant's brother at the defendant's trial. Although the defendant contends that his stepfather was simply abusive, this Court finds that the combined testimony of the witnesses refutes this allegation. The testimony of Mitchell Tanner and Dwayne Watson established that the defendant grew up like "all of the rest of us." The defendant got into trouble and stayed out with his friends past his established curfew, even though he knew he would incur the wrath of his stepfather once he got home. The defendant's next door neighbor, James Holliman, testified that he would hear the defendant and his brother yelling, "I won't do it any more, I won't do it any." The defendant's aunt, Sonja Bigdon, testified that while the stepfather was always yelling at the defendant and his brother, he loved them in his own way, and that at times he was very good to them. Ms. Bigdon also testified that the defendant's mother also yelled and screamed at the defendant and his brother. Thus, while the witnesses' combined testimony of several incidents established that the defendant's stepfather was overzealous in his punishment of the defendant, the combined evidence also established that the defendant engaged in conduct that drew that punishment. First, this Court finds that the evidentiary hearing testimony of the defendant's attorney, Mr. McGuinness, and then the defendant's brother, Robert Jewell, established that counsel's

investigation as to mitigating evidence was not deficient. Counsel's testimony also established that the failure to present the testimony of some of these witnesses was a strategic decision. Second, this Court finds that this evidence was largely cumulative to the testimony presented at the defendant's trial, and further, that the combined effect of the additional testimony would not have garnered any additional mitigating weight over the evidence that was presented at trial; nor is there any reasonable probability that the jury would have found the combined weight of the mitigating facts to out-weigh the statutory aggravators. In making that finding, this Court has also taken into account the additional testimony of several of the witnesses regarding the defendant's acts of kindness towards them or their children (at least until the defendant was fifteen years of age).

The defendant also presented the testimony of his sister, Danette Rucker, and her "best friend," Bobbie Hart, that Ms. Rucker was sexually abused by the defendant's stepfather, in order to suggest that the stepfather (who is deceased) was simply abusive. Assuming, arguendo, that this testimony would have been admissible, this Court finds that the testimony of these two witnesses established that this evidence was not "available" at the time of the defendant's trial. Ms. Rucker testified that she intentionally repressed any memory of this information and that she only "recently" recalled it. She also testified that she never told her brothers or her mother about this information. Both Mr. Rucker and Ms. Hart testified that Ms. Rucker eventually told Ms. Hart about the sexual abuse, with the

understanding that she did not want anyone else to know about this information. Ms. Rucker testified, in effect, that the public had no right to know of her sexual abuse and that she did not want anyone to know. Accordingly, this Court finds that this information was not available at the time of this trial and that counsel's performance was not deficient in failing to discover it.

The defendant also presented the testimony of Danette Rucker, Faith McQueen, Robert Jewell and Dwayne Watson, regarding three incidents in which the defendant incurred a head injury. Ms. Rucker and Mr. Jewell testified that the defendant was accidentally backed over with a car by a neighbor when he was two years old. Both witnesses testified that they did not recall much about the incident. There were no medical records available as to the nature or severity of any head injury that the defendant may have suffered. Ms. Queen, the defendant's girlfriend for a period of time, testified that the defendant had once told her that his stepfather knocked him unconscious for losing a school bus fight. Mr. Watson testified that, while a child, the defendant road his bike off a ramp and fell, and that the defendant did not move for about a minute. Based on the testimony of the defendant's attorney and that of Robert Jewell, this Court finds that counsel's investigation was not deficient in regard to this evidence as well. Counsel testified that he was aware of the car accident -but that there were no medical records available regarding the accident - with which to be able to establish the nature and severity of any head injury and the defendant's commission of

the two murders. Although the defendant suggested that his trial counsel should have used the defendant's school records to come to the same assumption that Dr. Larson testified to - that the defendant had a mild neuropsychological impairment, counsel testified that he made the strategic decision not to attempt to suggest this to the jury because the school records also contained negative information which would have been harmful to the presentation of his defense (additionally, this Court will note that even Dr. Larson admitted that the best evidence that the defendant had suffered some form of actual brain trauma would have been the medical records at the time of the accident). Counsel noted that the school records contained opinions of school personnel that the defendant was lazy and uncooperative. This Court finds counsel's strategic decision not to present this evidence and theory to have been reasonable under the totality of the facts of this case. That finding is not diminished by the virtue of the testimony of the two other incidents. There were no medical records to show the nature or severity of any actual brain trauma as to those incidents as well. Moreover, not a single witness testified that the defendant showed signs of some form of impairment following the incidents (let alone signs of permanent impairment). Therefore, this Court finds that counsel's performance was not deficient in regard to this issue. This Court also finds that there is no reasonable probability, under the totality of the facts, that the jury would have found the mitigating evidence to have outweighed the overwhelming combined weight of the statutory aggravators.

ISSUE FIVE

That counsel rendered ineffective assistance of counsel by failing to subpoena a witness, David Sorrells. Sorrells had testified at the penalty phase of defendant's Epps murder trial, regarding the defendant's abused childhood. When Sorrells could not be located at the time of the penalty phase in the instant case, his testimony in the Epps trial was read to the jury. The defendant alleges that because the jury in the Epps case recommended a life sentence, Sorrells' live testimony may have had a greater impact on the jury in the instant case. The defendant presented Sorrell's live testimony at the evidentiary hearing. Sorrells acknowledged that he did not testify to anything that he had not testified to at the Epps murder trial.

First, this Court finds that the evidence failed to show that counsel's performance was deficient. Counsel testified to (as a tactical matter) he did not subpoena witnesses for the penalty phase that he had previously had cooperative contact with, so as not to put the State on notice of who his penalty phase witnesses would be (a tactic similarly used by the State). Counsel testified that he was using the defendant's brother, with whom Sorrells was also a friend, to obtain Sorrell's presence at the instant trial [oddly enough, the defendant never had Sorrells testify why he was not present at the time of this trial or where he was. See, Johnson v. State, 769 So. 2d 990, 1002 - 1003 (Fla. 2000).]. This Court finds that counsel's tactical decision not to subpoena Sorrells was not outside the wide range of professionally competent

assistance under the facts of this case. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000).

Second, this Court finds that there is no reasonable probability the jury would have recommended a life sentence if it heard Sorrells' live testimony, as opposed to having Sorrells' testimony read to them. Sorrells did not testify at the evidentiary hearing to anything that he did not testify to at the Epps murder trial. Sorrells' (read) testimony was largely cumulative to the *live* testimony of the defendant's own mother and brother, who obviously had first hand information as to the subject matter of the testimony. The testimony of the defendant's abusive childhood was *uncontested* by the State and this Court found the defendant's abusive childhood to be a mitigating factor. Having witnesses Sorrells' live testimony, this Court finds that his live testimony would have had little or no impact on the jury's decision making process given the circumstances noted in this paragraph, and further, that there is no reasonable probability that his live testimony would have out-weighted the aggravating circumstances of the Epps murder conviction, such that the jury would have recommended a life sentence under the totality of the circumstances in this case. Ventura v. State, 26 Fla. L. Weekly S361, 2001 WL 543668 (Fla. May 24, 2001); Valle v. State, 788 So. 2d 960, 966 (Fla. 2001); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2001); Assay v. State, 769 So. 2d 974, 987 - 988 (Fla. 2000).

Based on the above, it is:

ORDERED AND ADJUDGED that the defendant's Amended Motion to Vacate Judgments of Conviction and Sentence is **DENIED**. The defendant shall have thirty (30) days from the date that this Order is filed in which to take an appeal, by filing a Notice Of Appeal with the Clerk of this Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this *24th* day of *July*, 2001.

s/ Donald R. Moran
DONALD R. MORAN, JR.
CIRCUIT JUDGE

Copies to:

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been sent to counsel for defendant by U.S. Mail on this *25th* day of *July*, 2001.

s/ Mary Lou Martinson
Mary Lou Martinson
Judicial Assistant

Case No.: 86-11599-CF

SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 25, 2003

CASE NO.: SC01-2007

Lower Tribunal NO.: 86-11599-CF

JOHN D. FREEMAN VS. STATE OF FLORIDA

Appellant(s) Appellee (s)

Appellant's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE AND CANTERO, JJ., concur.

A True Copy
Test:

s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

Tc
Served:

JAY TAYLOR
FRANK J. TASSONE, JR.
CHARMAINE M. MILLSAPS
HON. DONALD R. MORAN, JR., CHIEF JUDGE
HON. JIM FULLER, CLERK